

FILED

FEB 14 2014

Clerk, U.S. District Court
District Of Montana
Missoula

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MATTHEW LYNN MONTGOMERY,

Petitioner,

vs.

T. GREEN; ATTORNEY GENERAL OF
THE STATE OF MONTANA,

Respondents.

CV 13-181-M-DWM-JCL

ORDER

Matthew Lynn Montgomery is a state prisoner proceeding pro se. He petitions this Court for a writ of habeas corpus under 28 U.S.C. § 2254. Magistrate Judge Lynch recommends dismissing the petition. (Doc. 6.)

Montgomery timely filed an objection to Judge Lynch's Findings and Recommendation, (Doc. 7), and is therefore entitled to *de novo* review of the specified findings or recommendations to which he objects. 28 U.S.C. § 636(b)(1). The Court reviews the Findings and Recommendations not specifically objected to for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981).

Montgomery objects to Judge Lynch's Findings and Recommendation on the grounds that because the Montana Supreme Court's judgment denying his state habeas petition is "new," it cannot be a "second or successive petition."

Montgomery is incorrect. The state habeas petition he filed challenges the state judgment entered on his state convictions. Although there is an intervening judgment regarding that state habeas petition, it is not a new criminal judgment in the way Montgomery contends. Therefore, Judge Lynch correctly determined that the current petition is a second or successive application for federal habeas relief. Because the Court of Appeals has not authorized its filing, this Court lacks jurisdiction to consider it. *Burton v. Stewart*, 549 U.S. 147, 149 (2007) (per curiam).

Montgomery further argues that certain statements made by Chief Justice of the Montana Supreme Court, Mike McGrath, definitively show that he was treated unfairly in his state petition. Even assuming the allegations in the affidavit are correct (Doc. 7-1), the fact remains that this is a second or successive petition and the Court lacks jurisdiction over this matter.

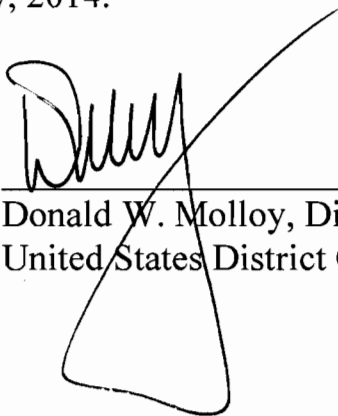
Finally, the Court agrees with Judge Lynch's determination that there is no doubt this is a procedural ruling and thus a certificate of appealability is not warranted. *Gonzalez v. Thaler*, ___ U.S. ___, 132 S. Ct. 641, 648 (2012).

Accordingly, IT IS ORDERED that the Findings and Recommendation (Doc. 6) is ADOPTED IN FULL. Matthew Lynn Montgomery's petition for writ of habeas corpus (Doc. 1) is DISMISSED as an unauthorized second or successive petition.

IT IS FURTHER ORDERED that the Clerk of Court is directed to enter by separate document a judgment of dismissal.

IT IS FURTHER ORDERED that a certificate of appealability is DENIED.

Dated this 14th day of February, 2014.



Donald W. Molloy, District Judge
United States District Court